No. 77-1007

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

ALLEN J. LEFFERDINK, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Allen J. Lefferdink, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The court of appeals affirmed without an opinion (App. A, infra, p. 10) and petitioner's request for rehearing en banc was denied (App. B, infra, p. 11).

JURISDICTION

The judgment and mandate of the court of appeals was entered on November 11, 1977 (App. A, infra, p.). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment right to due process as it pertains to preindictment delay requires a showing of both actual prejudice and "purposeful" governmental delay.

2. If the Fifth Amendment requires such a showing, whether after there has been shown a prejudicial delay the government has the burden of showing that the delay was not "purposeful."

STATEMENT

In November 1971 Petitioner was subpoenaed but not called before the Federal Grand Jury for the Southern District of New York. This subpoena was subsequently adjourned without indictment in January 1972.

A government postal inspection of petitioner's activities was instituted in Washington, D.C. in February 1972 which was followed by a New York postal inspection in March 1972.

In June 1972 the United States Department of Justice began an investigation of petitioner and in August of 1972 petitioner made his first appearance before the Federal Grand Jury for the Southern District of New York.

The Assistant United States Attorney, a United States Postal Inspector, petitioner's attorney and petitioner then met in New York in November 1972. Correspondence was later exchanged

between the United States Attorney's Office and petitioner's counsel in December 1972 concerning the November 1972 meeting.

The postal inspection that had begun in New York sometime in March of 1972 was terminated in March 1973 and transferred to Washington, D.C. At approximately this same time the United States Department of Justice assigned the case to one of its attorneys, who began a formal investigation almost one year later in January 1974.

Petitioner was then subpoenaed before the Federal Grand Jury for the Southern District of Florida in April of 1974. Petitioner was then indicted by the Federal Grand Jury on March 21, 1975, for violation of: Title 18, United States Code, Section 1341, mail fraud; Title 18, United States Code, Section 1343, wire fraud; and Title 18, United States Code, Section 371, conspiracy.

On September 3, 1975, petitioner filed a Motion to Dismiss on the grounds, inter alia, that there was prejudicial preindictment delay which violated his Fifth Amendment right to due process. The Motion was denied on September 9, 1975 on the grounds that petitioner failed to show that the delay was an intentional device by the government to gain tactical advantage over petitioner.

Petitioner on September 10, 1975 moved to review the order on the grounds that absent an evidentiary hearing, petitioner was unable to claim that the

preindictment delay was intentional. The evidentiary hearing was held on October 23, 1975, after which petitioner's Motion to Dismiss was denied without prejudice.

Petitioner was tried by a jury and found guilty of fifteen (15) counts of mail fraud, one (1) count of wire fraud and one (1) count of conspiracy.

On May 6, 1976, petitioner filed a Notice of Appeal with the United States Court of Appeals for the Fifth Circuit wherein he asserted, inter alia, that the District Court erred in denying his Motion to Dismiss the indictment due to prejudicial preindictment delay. Petitioner asserted that he suffered actual prejudice during the forty (40) month preindictment delay in that: (1) petitioner's personal attorney, Norman Laidhold, and attorney for all of petitioner's financial entities died in March of 1974, one month before petitioner was called before the Grand Jury. Mr. Laidhold was the lone exculpating witness for petitioner in that he had formed the financial entities in question and prepared many of the documents in question; (2) Petitioner was led to believe by the government that the case was closed in 1972 and thus he did not obtain and/or retain evidence which would have exculpated him.

Oral argument in the Court of Appeals was heard on October 13, 1977, during which time the government was unable to explain the two twelve month periods of inactivity by the government. The Court

of Appeals affirmed on November 11, 1977 without an opinion and denied petitioner's request for rehearing en banc on December 16, 1977.

REASONS FOR GRANTING WRIT

I

Certiorari Should Be Granted to Resolve Conflicts in Standards Among the Lower Courts

This case presents the question of the proper application of the due process clause of the Fifth Amendment as it pertains to preindictment delay. This Court in United States v. Marion, 404 U.S. 307 (1971), failed to find a violation of the Due Process Clause on the basis that there was neither actual prejudice to the defendant, alleged or proved, nor a showing that the government intentionally delayed to gain some tactical advantage, Id. at 325. Thus, although there is no doubt that Marion contains the prevailing test, there is substantial doubt among the circuit as to its application.

The confusion and resulting inconsistency of application stems from the fact that the Court in Marion merely announced that the government conceded that satisfaction of both elements would be sufficient. With this announcement, some of the circuits have gone on to interpret Marion as requiring that these two elements, i.e. actual preindictment prejudice and purposeful governmental delay, be applied conjunctively while other circuits have used a disjunctive

application. See United States v. Avalos, 541 F.2d 1100, 1107 (5th Cir. 1976); United States v. Byrum, 540 F.2d 833, 834 (5th Cir. 1976), cert. denied, January 25, 1977 (No. 76-5702); United States v. Beitscher, 467 F.2d 269, 272 (10th Cir. 1972); United States v. Washington, 150 U.S. App. D.C. 68, 463 F.2d 904, 905 (1972); United States v. Daley, 454 F.2d 505, 508 (1st Cir. 1972); Powell v. United States, 352 F.2d 705, 707 (D.C. Cir. 1965); cf United States v. Croucher, 532 F.2d 1042, 1044 (5th Cir. 1976); United States v. McKim, 509 F.2d 769, 772-73 (5th Cir. 1975); United States v. Schools, 486 F.2d 557, 558 (5th Cir. 1973); United States v. Schwartz, 464 F.2d 499, 503 n.5 (2nd Cir.), cert. denied, 409 U.S. 1009 (1972); United States v. Houp, 462 F.2d 1338 (8th Cir.), cert. denied, 409 U.S. 1011 (1972). There is no actual Supreme Court authority squarely holding that satisfaction of both elements of the test is necessary to find a due process violation. See United States v. Avalos, supra, 1107 n.9. Therefore, there still remains substantial doubt whether, in a case in which actual preindictment prejudice is shown, the government's purposeful delay would have to also be shown.

The Eighth Circuit observed in United States v. Barket, 530 F.2d 189 (8th Cir. 1976):

> "In previous cases, this and other circuits have not had occasion to determine whether Marion is to be read conjunctively because the circumstances before them did not include sufficient prejudice to the defense from preindictment delay to merit relief even if joined with a showing of serious governmental 'gamesmanship'." Id. at 194.

The Barket court went on to find that negligent though inadvertent governmental conduct was sufficient to constitute a due process violation. Id. at 195. In addition, in United States v. Lavasco, 97 S. Ct. 2044 (1977), the government has expanded upon their concession that a "tactical" delay would violate the Due Process Clause by stating that a due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of the circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense. Id. at 2051 n. 17.

Based on the foregoing doubt among the circuits in applying Marion, petitioner urges this Court to examine the Marion test as it has developed and clarify its proper use. Petitioner contends that because the delay between the time of the alleged offense and the indictment is clearly the responsibility of the government and arranged solely for its advantage, petitioner should not be forced to labor under an exacting burden of proof to show that there was no legitimate reason for the government's delay. Once the petitioner has shown a plausible claim of prejudice, the government should bear the burden of proving a justifiable delay with

facts and circumstances within their particular knowledge and unknown to the accused. See United States v. Deloney, 389 F.2d 324 (7th Cir. 1968); Jackson v. United States, 351 F.2d 821 (D.C. Cir. 1965).

II

Certiorari Should Be Granted To Resolve a Question of Importance to the Public

Aside from the need to maintain a uniform course of decisions, supra, the question as to the proper application of due process is certainly a matter of gravity and importance to the public. The uniform and fair administration of our laws, guaranteed under the United States Constitution, is of concern to each citizen individually as well as the public in general. Any standard that places an impossible burden on a defendant, as some circuits have done by adopting the conjunctive approach, deserves the attention of this Court to resolve and clarify the guidelines in order to assure due process of law. See NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951); Rice v. Sioux City Memorial Park Cemetery Inc., 349 U.S. 70 (1955). The conjunctive approach effectively places the burden of proof on the accused to expose and prove the motivations of the government in a preindictment delay situation. Such an approach is inherently contrary to those principles upon which this country's notions of due process are based and, therefore, petitioner urges this Court to closely examine those practical

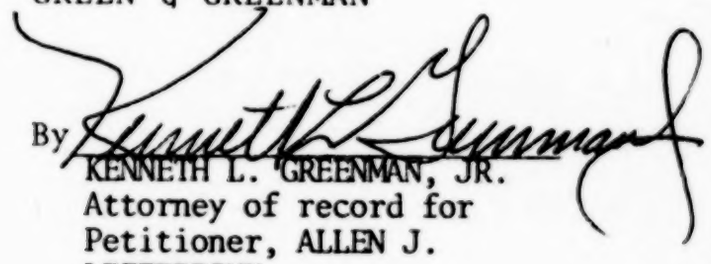
difficulties involved in this question of public importance.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted in order that a clear and unequivocal standard be rendered in order to secure and maintain uniformity among the lower courts regarding a question of such exceptional importance.

Respectfully submitted,

GREEN & GREENMAN

By 

KENNETH L. GREENMAN, JR.
Attorney of record for
Petitioner, ALLEN J.
LEFFERDINK

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76-4106

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ALLEN J. LEFFERDINK,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida

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(November 11, 1977)

Before GOLDBERG and MORGAN, Circuit Judges, and WYZANSKI, District Judge.*

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

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*Senior District Judge of the District of Massachusetts, sitting by designation

[1/] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

Office of the Clerk

December 16, 1977

TO ALL PARTIES LISTED BELOW:

No. 76-4106 - U.S.A. v. ALLEN J. LEFFERDINK

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing;**and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By BRENDA M. HAUCK
Deputy Clerk

**on behalf of appellant, Lefferdink,